

U.S. Department of Labor

Office of Administrative Law Judges
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CASE NOS.: 2000-LHC-02776
2000-LHC-02777

OWCP NO.: 01-149101
01-149102

In the Matter of

JEFFREY HORTON
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insured

and

ANCHOR INSULATION COMPANY, INC.
Employer

and

BEACON MUTUAL INSURANCE
Carrier

Appearances:

Scott N. Roberts, Esquire, Groton, Connecticut, for the Claimant

Mark Oberlatz, Esquire (Murphy & Beane), New London,
for Electric Boat Corp.

Edward W. Murphy, Esquire (Morrison, Mahoney & Miller),
Boston, Massachusetts, for Anchor Insulation Co. and
Beacon Mutual Insurance

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from claims for worker's compensation benefits filed by Jeffrey Horton (the Claimant) against the Electric Boat Corporation (EBC) and the Anchor Insulation Company, Inc. (Anchor) under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), the matter was referred to the Office of Administrative Law Judges for a formal hearing. A hearing was conducted before me in New London, Connecticut on January 9, 2001, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and appearances were made on behalf of EBC, Anchor and Anchor's insurance carrier, Beacon Mutual Insurance (Beacon). The Claimant and two witnesses called by Anchor testified at the hearing, and documentary evidence was admitted as CX 1-6, RX 1-9 and AX 1-27.¹ During the hearing, I granted Anchor's motion to compel the Claimant's attendance at a vocational evaluation, and I held the record open until February 21, 2001 for Anchor to offer the report of its vocational expert and for the parties to offer additional evidence including any rebuttal by the Claimant. Within this time frame, the parties offered the following post-hearing evidence:

<u>Document</u>	<u>Exhibit Number</u>
Anchor Insulation Time Sheets	AX 28
Deposition Transcript, Dr. Browning (1/8/01)	CX 7
Deposition Transcript, Dr. Willetts (1/25/01)	RX 10
Vocational Analysis (15/01)	AX 29
Vocational Assessment Report (2/16/01)	AX 30

No objection was received, and CX 7, RX 10 and AX 28-30 have been admitted into evidence.

¹ The following references will be used in this decision: "ALJX" for the formal papers; "JX" for a joint exhibit; "CX" for a Claimant's exhibit; "RX" for an exhibit offered by EBC; "AX" for an exhibit offered by Anchor; and "TR" for the official hearing transcript.

The Claimant did not request to offer any rebuttal evidence, and the record was closed after EBC and Anchor timely submitted written closing argument.

After careful analysis of the evidence contained in the record, I have concluded that the Claimant is entitled to an award of temporary total disability and temporary partial disability, medical care, interest and attorney's fees, for which Anchor and Baecon are liable as the responsible employer and carrier. My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

At the hearing, the parties offered the following stipulations which I now adopt as my findings:

A. Stipulations between the Claimant and EBC and Issues Raised by EBC

1. The Act applies.
2. The date of injury was June 27, 1991.
3. The injury occurred during the course and in the scope of the Claimant's employment at EBC;
4. There was an Employer/Employee relationship at the time of the injury.
5. The Employer was advised of the injury in a timely manner.
6. The claim for benefits was timely filed.
7. The notice of controversion was timely filed.
8. The informal conference was held on May 10, 2000.

TR 34-35, 37. The Claimant and EBC further agreed that the unresolved issues relating to the claim against EBC are (1) the nature and extent of the Claimant's disability as it relates to the June 27, 1991 injury, (2) the causal relationship between any current disability and the June 27, 1991 injury and (3) the identity of the last responsible employer. TR 35.

B. Stipulations between the Claimant and Anchor and Issues Raised by Anchor

1. The parties are subject to the Act.
2. There was an alleged injury on September 9, 1999.

3. The notice of controversion was timely filed on March 14, 2000.
4. The informal conference was held on May 10, 2000.
5. The Claimant's average weekly wage at Anchor was \$540.00 with a corresponding compensation rate of \$360.18.
7. The Claimant has not returned to his regular employment.

TR 35-37. The Claimant and Anchor further agreed that the unresolved issues relating to the claim against Anchor are (1) jurisdiction, (2) whether Anchor was timely notified of the alleged injury, (3) whether there was an Employer/Employee relationship at the time of the alleged injury and (4) the nature and extent of any disability resulting from the alleged September 9, 1999 injury. TR 35-36.

After the close of the hearing, the parties submitted an additional stipulation that the Claimant earned \$2,000.00 from various employment during the period of his disability. Stipulation of the Parties Regarding Claimant's Earnings, submitted by letter dated April 20, 2001.

III. Summary of the Evidence

Then parties have submitted a substantial body of evidence consisting of the testimony of witnesses at the hearing and at depositions, medical and employment records and expert medical opinions. While I have carefully reviewed and considered all of evidence of record, the following summary is limited, in light of the parties's stipulations, to the evidence bearing on the unresolved issues.

A. The Claimant's Testimony

In addition to his testimony at the hearing, the Claimant was deposed by counsel to EBC on December 7, 2000, and the deposition transcript was admitted into evidence at the hearing as Claimant's Exhibit CX 5 pursuant to 29 C.F.R. 18.22(d). All parties were represented at the deposition, and it was stipulated that there was compliance with applicable notice requirements. CX 5 at 3.

The Claimant testified that after finishing high school, he worked for about four years picking mushrooms at Franklin Farms in Franklin, Connecticut. CX 5 at 14. He denied injuring his back or any other work-related injuries during his employment at Franklin Farms. However, he did acknowledge a visit to a hospital emergency room in 1987 for a "pulled muscle or something" in his back, but said that he did not remember how he sustained this injury and that he did not file any workers' compensation claim. *Id.* at 14-15. He also recalled injuring his ribs and chest in a motor vehicle accident in 1986 and being seen in the emergency room for these injuries. *Id.* at 16. He

testified that he worked for a few months in 1984 at a furniture factory where he did not recall being injured. *Id.* at 32-33.

The Claimant further testified that after leaving Franklin Farms, he went to work at EBC as a lagger/insulation on March 22, 1990. CX 5 at 12-13. He stated that he was hurt “numerous times” at EBC, sustaining injuries to his back, hands and shoulder. *Id.* at 17. He said that he injured his back in 1991 and reported the injury to EBC’s Yard Hospital but did not seek other medical attention or miss any time from work during 1991. *Id.* at 17-18, 35-36. He also testified that, apart from reporting to the Yard Hospital, he did not seek any medical attention for his back until 1998 when he was employed by Anchor and was seen by a Dr. Korn and another doctor at the Pequot Occupational Health Clinic. *Id.* at 21-22; TR 53-55. Although he did not miss any work in 1991 due to the back injury, the Claimant testified that he subsequently missed days “here and there” due to the back injury over the remainder of his employment at EBC. CX 5 at 18. He never filed a workers’ compensation claim for this lost work time because he had been told that he’d have to be out of work for a couple of weeks before he could file a claim, and he could not afford to be out of work that long. *Id.*

The Claimant further testified that he began working for Anchor on November 23, 1997, initially out of a shop located in New London, Connecticut and later from a shop located in East Lyme, Connecticut. He stated that he worked for Anchor as a supervisor, mostly doing marine work on high speed ferries, yachts and sailboats. CX 5 at 8. He testified that his work for Anchor on the high speed ferries took place at the Pequot River Shipworks (PRS) which is located in New London, Connecticut on a navigable waterway. The Claimant stated that his work for Anchor on the ferries at PRS involved installing insulation, carrying “pin welders” weighing 75 to 80 pounds up and down ladders into the bilges where a good part of the insulation work was performed. *Id.* at 9. He testified that he also did insulation work at PRS under pontoons and under the pilot house of the ferries. *Id.* at 10. In addition to working on the ferries at PRS, the Claimant testified that he worked on jobs for Anchor at AES Thames, Dow Chemical, Coca-Cola in Hartford, Pfizer and the Derecktor Shipyard in Mamaroneck, New York. *Id.*

The Claimant admitted that he had told Anchor representatives in the past that the back condition which gives rise to his claim for compensation was not in any way caused by his work at Anchor. CX 5 at 60-61. He also stated that he did not contend that his employment at Anchor “worsened” any of his medical conditions, and he was unsure whether his work at Anchor aggravated or accelerated any underlying injuries:

- Q. Did you contend that your work at Anchor in any way aggravated or accelerated your underlying injuries?
- A. I won’t say accelerated, you know. There was an injury there, it’s there. As far as aggravating it, no matter where I worked or what I did, I think that in time with the nature of the injury it would flare up, you know, not all the time

but sometimes worse than others. It didn't worsen it, I don't think. I don't know. I'm not a doctor. But my personal opinion, I don't think it worsened it.

Id. at 55-56. However, the Claimant testified that his back bothered him when he was working for Anchor in confined spaces on vessels at PRS and the Derecktor Shipyard and that he took vacation or sick days, including two weeks in 1998 when he went to see Dr. Korn, while he worked at Anchor because his back was bothering him. *Id.* at 93-94. While the Claimant described experiencing back pain almost all of the time after his 1991 injury, he described the episode which brought him to see Dr. Korn in 1998 as different:

A. When I went to see Dr. Korn. That was scary.

Q. So it's your testimony then that your back pain was actually worse at that point?

A. Yes. It scared me.

Q. In what ways was it worse?

A. I couldn't move. I mean, I couldn't move. I rolled out of the bed. I swear to God, I crawled to the bathroom pulling myself up to the walls. I cleaned up the best I could. I tried once I stood – trying to pull myself up, I tried to stretch and everything and I managed to get myself to the emergency room. I took a cab up there.

Id. at 95. He stated that his back got better after he was off work for two weeks, but he denied that his back condition had completely resolved when he returned to work because he was still "hobbled" to the point that a co-worker warned that the company would probably send him home. *Id.* at 96.

The Claimant testified that he was "put out of work" by Anchor in September 1999, "probably for my back." CX 5 at 20. He testified that he was working at Pfizer for a couple of days before he was let go, but he stated that his back started bothering him while he was working on the ferries at PRS, not at Pfizer. *Id.* at 23. In this regard, the Claimant specifically denied the statement's attributed to him in a report from Dr. Willetts that he had developed back pain while working on a roof at Pfizer. He stated that he had worked on a roof at Pfizer in the past but not after he hurt his back while working at PRS in September 1999, and he testified that Dr. Willetts had been occupied looking at x-ray films and did not give careful attention to his history. TR 51-52. The Claimant also stated that he had gone to see Dr. Browning during August 1999 because his back had gotten worse while he was working for Anchor at PRS, particularly when he had to squeeze his way into and around confined spaces in the engine compartments and pilot house on the ferries. *Id.* at 24-25. He testified that after he had been assigned to work on Anchor's Pfizer job, he was sent back to PRS for three days in September 1999

to repair insulation work on a ferry and spent a day working around the engines in a confined, slippery area, and two days under the pilot house where he spent most of the time on his knees working in a bent over position. TR 56-58; CX 5 at 24-25, 71-76, 99-102. The Claimant said that he worked alone on this job, as it was “short man-hours” (*i.e.*, the repair work exceeded the number of man-hours that Anchor had estimated in bidding on the job), and he called Dr. Browning over the weekend after he completed the job because his back felt bad. TR 76; CX 5 at 102-103. He described the back pain at that point as different from what he had experienced in the past:

The pain before I joined Anchor, it was right across the back of the – it’s where the belt line was at. Like I said, you’re always sore because you’re in confined spaces. I mean, everybody that worked at EB ached. No one’s going to tell you that they don’t. But when I worked for Anchor in September of 1999, I have never – it felt like a lightening rod had hit you – I mean a bolt of lightening had hit you in the butt and went right down to your feet. It went right through your left leg. And when it got down there, it started to burn. And it felt like a hamstring pull.

Id. at 96-97. The Claimant was questioned under cross-examination at the hearing regarding time cards, AX 28, which he had signed during August and September 1999, and he acknowledged that these cards showed him working at PRS for only four hours on Wednesday, September 1, 1999 and at the Pfizer job for the remainder of that week. TR 62-64.² Although the Claimant also acknowledged that Anchor’s employee time cards are used to charge time to customers and that it is important that the time cards be kept accurately, TR 63, he insisted on redirect examination that he had worked at PRS on Wednesday, Thursday and Friday during the week ending September 5, 1999 and that he had also worked five hours of overtime on Saturday, September 4, 1999 moving boxes of material from the PRS warehouse to Anchor’s warehouse. TR 72-74, 79-83.³ Regarding the conflict between the time

² The time cards show the Claimant working the following hours: 32 hours at PRS during the week ending August 2, 1999; 39.5 hours at PRS during the week ending August 8, 1999; 48 hours at PRS during the week ending August 15, 1999; 41 hours at Derektor during the week ending August 22, 1999; 32 hours at Pfizer during the week ending August 29, 1999; 36 hours at Pfizer, 4 hours at PRS on Wednesday September 1, 1999 and 5 overtime hours for “material handling” on Saturday, September 4, 1999 during the week ending September 5, 1999; and 8 hours on Tuesday September 7, 1999 at Pfizer. AX 28. The Claimant’s time sheet for the week ending September 12, 1999 contains the following notation in a section labeled “Office Use Only”: “Kim: Jeff is out w/back 9/7 to 9/10.” *Id.* at 1. “Kim” is identified in the record as Anchor’s secretary. CX 5 at 58.

³ It is noted that the Claimant stated at one point during his redirect examination that he “spent two days . . . working at Pequot River Shipworks” during the week ending September 5, 1999, TR 72, which varies from his other testimony that he worked at PRS from Wednesday, September 1, 1999 to Friday, September 3, 1999 as well as five hours of overtime on Saturday September 4, 1999 moving materials from the PRS warehouse back to Anchor’s facilities. However, the Claimant testified at

card for the week ending September 5, 1999 and his testimony that he had worked for more than four hours at PRS, the Claimant testified that time cards do not always accurately reflect where an employee worked: "I mean you can do a different job. All you have to do is charge it to someone else, which is quite common in construction work." TR 73. According to the Claimant, he was originally assigned to work at Pfizer beginning on Monday, August 30, 1999, but he was later told by his boss, Carl Lallier, that he was needed back at PRS. TR 56-57. The Claimant further testified that his recollection that he worked at PRS for three days from Wednesday, September 1, 1999 to Friday, September 3, 1999 is consistent with an Anchor job order, RX 12, which shows that he was sent to PRS on September 1, 1999 and completed the work on September 3, 1999. TR 81.⁴

With respect to the "material handling" work on Saturday, September 4, 1999, the Claimant testified that he worked with an Anchor foreman, Gary Monroe, lifting and carrying boxes, some of which weighed in excess of 200 pounds, out of the PRS warehouse. CX 5 at 43-44, 97-98. He stated that his back pain was not "significant" while he was doing this work. Id. at 98.

The Claimant testified that after he completed the work at PRS, he told Lallier that he might have to take some vacation time because his back was really bothering him. CX 5 at 24-25. When he reported back to work at the Pfizer job after the Labor Day holiday, the Claimant stated that Lallier told him that he had suffered long enough and that he should "[g]o out and get your back taken care of" and that he could take "two months, three months, four months, whatever it takes to get yourself straightened out." CX 5 at 56-57. The Claimant admitted that he had filed a claim through Anchor for disability insurance and that he had checked "No" in response to a question on the claim form (AX 2) which asked "If disability is due to an accident, did injury occur at work." CX 5 at 53-54. However, he pointed out that he has also written "yes" on the form because he was not sure how to answer the question:

Q. What did you mean by that?

A. Because I wasn't sure. It's not like I fell off of a boat. You know what I mean. It's not like I got physically hurt or nothing. I wasn't sure how to answer that. I didn't get hurt – you know what I mean – like something fell on me or something like that. But I think over – I think over the time frame as time progressed that it – that it felt, you know, uncomfortable at times, As far as

length concerning his work from September 1, 1999 through September 3, 1999 and, with this one exception, consistently described working at PRS for three days.

⁴ The work order is dated September 1, 1999 names PRS as the client. The work is described as "Repair starboard engine room A-60, behind Gen. Replace overhead in sanitation area, fwd Pilot House area." The work order states that the job was expected to take 24 hours, starting on September 1, 1999 and finishing on September 3, 1999. RX 12.

getting injured, I never – you know what I’m trying to – I didn’t fall or nothing fell on me or anything like that.

Id. at 54.⁵ The Claimant expressed this same confusion repeatedly at his deposition and at the hearing when asked whether he suffered any “injury” while employed at Anchor. CX 5 at 87; TR 52.

In addition to his work at Anchor, the Claimant testified that he had worked occasionally on weekends for a friend who operated a moving business and that he stopped this intermittent employment late in the Summer of 1999 because of increasing back pain. CX 5 at 38-42. He stated that this work involved moving furniture and appliances, but there were no incidents which he believed to be contributory to his back pain. He explained that lifting never really bothered him and that his back pain was due to twisting, bending and “being balled up in a knot all day.” *Id.* at 43. He also testified that he had helped a friend move approximately three times prior to 1999. *Id.* at 44.

The Claimant testified that subsequent to leaving Anchor, he painted his landlord’s stone wall for about four hours during the Summer of 2000. CX 5 at 45-50. He also testified that he made three work attempts during the Fall 2000 which he had to abandon due to his back pain.⁶ Specifically, he worked at the TLS machine Shop in New London for two weeks in September 2000 as a janitor/delivery man but quit because the job entailed picking up heavy metal parts on a slippery floor which he feared would further injure his back. TR 44-46. He then went to work in October 2000 at a Target department store unloading trucks and stocking shelves on the night shift but had to quit after a month because he could not tolerate the constant bending and reaching and because the medication he takes for his back pain causes drowsiness at night. TR 40-42. After leaving Target, the Claimant enrolled in an apprenticeship program operated by the carpenters’ union which assigned him to a job at the Mohegan Sun Casino. He stated that he quit as soon as he arrived on the job and learned that he would have to lift 5/8 inch thick sheetrock panels up to a narrow scaffold, work that he did not believe he could do with his back condition. TR 42-43.

Finally, the Claimant testified that he felt that he could still lift as much as 50 pounds but that back pain limits his ability to work in confined spaces and pull weight. He also stated that excessive cold and wet conditions bother his hands. CX 5 at 51-53.

⁵ The record shows that the Companion Life Insurance Company paid the Claimant short term disability benefits from September 16, 1999 to March 15, 2000 at \$360.00 per week for a total of \$9,360.00. AX 18.

⁶ As discussed above, the parties have stipulated that the Claimant earned \$2,000.00 from this employment.

B. Testimony of Eric Fisk

Mr. Fisk testified that he is a part-owner and vice-president of Anchor which currently employs about 80 individuals in its mechanical and acoustical insulation business. TR 86. He testified that the Claimant was hired in 1997, primarily to work aboard vessels, and that he was assigned to work in various locations which included PRS, the Derecktor shipyard, Pfizer and Dow Chemical. TR 87-88. He stated that the Claimant initially worked under a foreman but had progressed to working as a foreman on jobs including his last job at PRS. TR 88-89. Mr. Fisk said that he regularly observed the Claimant at work and regarded him as an excellent worker and valued employee. TR 89. Mr. Fisk stated that the Claimant never mentioned any injury while working for Anchor and, although it was “fairly well-known” that he suffered from a sore back, the Claimant said that there was nothing he was doing at Anchor that was causing him harm. TR 89-90.

Mr. Fisk further testified that Anchor has a policy on injury reporting that is communicated to employees during their safety indoctrination and in bulletins distributed with pay checks. Under Anchor’s policy, any injury is supposed to be reported to the foreman or general manager, and a written report is always generated whenever an injury is reported. TR 91-92. According to Mr. Fisk, no report of injury was received from the Claimant while he was employed at Anchor. TR 92. Mr. Fisk stated that he had read the Claimant’s deposition testimony and the reports from Dr. Willetts and was surprised that there was a claim that the Claimant’s back injury was aggravated at Anchor, and he denied knowledge of any alleged injury suffered by the Claimant while working in the bilge or pilot house at PRS. TR 93-94.

Regarding the discrepancy between the Claimant’s time sheet and the job order for the work at PRS, Mr. Fisk testified that the job order is an “estimate” and that the start and finish dates do not necessarily reflect when the work was actually done, while the time card is “bible” which constitutes the employee’s “written history” and shows when the work was performed. TR 94-98. After reviewing the time card and job order, Mr. Fisk testified that the records showed that the Claimant had taken four hours to complete a job which had been estimated for 24 hours. TR 97-98. Mr. Fisk further stated that the Claimant worked alone at PRS and that he did not observe the Claimant working at PRS or Pfizer during the pay week ending on September 5, 1999. TR 97.

Mr. Fisk testified that the Claimant’s last day at Anchor was September 7, 1999 when he left to take care of his back. TR 110-112. Though he acknowledged that Anchor was aware that the Claimant left work because of a back problem, he stated that the Claimant’s February 23, 2000 claim, alleging that he had sustained an injury during his employment at Anchor, came as a “shock and surprise.” TR 119-121. Mr. Fisk did not dispute the Claimant’s description of the physical demands of his work at Anchor. He also stated that the Claimant frequently worked in the engine room and pilot house areas of the PRS vessels, and he stated that the Claimant’s job did require work in some tight areas, overhead work and work that was occasionally awkward. TR 119, 130-131.

C. Testimony of Gary Monroe

Mr. Monroe testified that he is currently employed as the operations manager of Anchor's Connecticut Division and was employed by Anchor as the foreman on the Pfizer job in August and September 1999. TR 134. He said that the Pfizer job was at a pharmaceutical research facility located in Groton, Connecticut and that he supervised about six employees including the Claimant who worked at Pfizer installing fiberglass insulation on ducts. TR 135-136.

Mr. Monroe further testified that the Claimant had stated on several occasions that he had suffered a back injury when he was employed somewhere else but did not attribute his back problems to anything at Anchor. TR 138-139. He stated that the Claimant's last day of work was spent on the Pfizer job where the Claimant worked for a full day measuring, cutting and installing fiberglass insulation in a mechanical room. He stated that he was with the Claimant for the entire day and neither observed the Claimant having any difficulty with these tasks nor heard him make any complaint about his physical condition. TR 139-140.

Mr. Monroe testified that he did not believe that he worked on Saturday, September 4, 1999, though he did recall moving boxes with the Claimant from the PRS warehouse to Anchor's Connecticut warehouse at some time prior to PRS's cessation of operations. TR 141-142, 146. However, he disputed the Claimant's testimony regarding the weight of the boxes, stating that they all weighed about 35 pounds and that he never lifted any boxes with the Claimant weighing in excess of 100 pounds. TR 143-145.

D. Medical Evidence

The medical evidence of record begins with a report dated September 1, 1986 from the Backus Hospital in Norwich, Connecticut where the Claimant was seen for complaints of chest and rib pain following a motor vehicle accident. The diagnostic impression was abrasions and contusions, and the Claimant was discharged with instructions for conservative treatment. RX 5.

Records from the Backus Hospital reflect that the Claimant returned on June 26, 1987, at which time he was employed at Franklin Mushroom, with complaints of sharp pain in his lower back while working. The diagnostic impression was a low back strain, and the Claimant was instructed to remain out of work for the rest of the week and to "rest, heat [and] take pills." RX 6.

Records from EBC's Yard Hospital indicate that the Claimant was seen on June 27, 1991 with complaints of pain in his lower back, left rib cage and left shoulder after he had reportedly become stuck while working behind a generator head. The Claimant was given a diagnosis of contusion and muscle sprain, and he was released with a supply of Ibuprofen (800 mg.) and instructions to apply ice followed by heat. RX 4. EBC reported this injury to the OWCP on an Employer's First Report of Injury of Occupational Illness. RX 1.

It appears that the Claimant next sought medical attention for his back on August 17, 1997 when he was employed at Anchor and went to the emergency room at the Lawrence and Memorial Hospital in New London with a complaint of lower back pain. He was discharged with a diagnostic impression of lumbar disc herniation and was given Toredol for pain relief. CX 3. The Lawrence and Memorial Hospital records show that the Claimant returned on April 22, 1998 when he was seen by Robert S. Korn, M.D. Dr. Korn reported that the Claimant stated that he had injured his back about eight years earlier and was then experiencing back pain of about one month's duration with radiation to the left buttock and tingling and numbness in the left thigh and dorsum of the left foot. Dr. Korn stated that the Claimant has been treated with intramuscular Toredol with excellent results and that he had been discharged with instructions to follow-up with Occupational Health to be certified for light duty and with Neurosurgery for a presumed lumbar disc herniation. CX 4A, 4B.

On August 13, 1999, the Claimant was seen for an evaluation on referral from his attorney by S. Pearce Browning, III, M.D., a board-certified orthopedic surgeon. Dr. Browning noted that the Claimant reported back and left shoulder injuries while working at EBC. In addition to examining the Claimant's hands for carpal tunnel syndrome, Dr. Browning also noted that the Claimant had tenderness in his left shoulder A/C joint and that x-rays demonstrated narrowing of the L5-S1 vertebra. AX 3.

At Dr. Browning's request, the Claimant underwent MRI examinations of his left shoulder and back on August 27, 1999. The MRI impressions were: (1) advanced tendinopathy of the supraspinatus tendon without evidence of a complete tear and significant degeneration versus subtle non-displaced SLAP lesion superior labrum; and (2) mild bulging at L3-4 and L4-5 and a small herniated nucleus pulposus at L5-S1 associated with minimal left paracentral and proximal foraminal narrowing. AX 5.

Dr. Browning's office notes confirm that the Claimant called him over the Labor Day 1999 weekend and reflect that the Claimant was seen on September 9, 1999. According to Dr. Browning's notes, the Claimant stated that he was very concerned his back condition had worsened and that his employer (Anchor) thought he should go out on temporary disability. Dr. Browning noted that the MRIs showed a herniated disc at LS-S1 and a lot of damage to the supraspinatous tendon in the left shoulder, so he placed the Claimant on temporary total disability status. AX 8.

Dr. Browning continued to follow the Claimant through the Fall of 1999. After seeing the Claimant on December 30, 1999, Dr. Browning wrote to the Claimant's attorney on January 10, 2000 that the Claimant continued to be out of work because of his back. He stated that he had reviewed the Claimant's history of employment at Anchor and that there was no back injury or other work injury at Anchor. He stated that he did not believe that the Claimant could return to work at either EBC or Anchor, and he recommended that the Claimant not work with air tools or at ambient temperatures below 50⁰ F., work with his left arm above shoulder level or do work requiring repetitive bending, twisting or heavy lifting. AX 13.

In February 2000, Dr. Browning referred the Claimant to the care of Camile Salame, M.D. as he was retiring. AX 15. Dr. Salame, a board-certified neurosurgeon, examined the Claimant on February 16, 2000 and took the following history:

As you recall, patient is a 33 year-old gentleman who started working at EB in 1990 and within the year hurt his lower back; first time when he was jammed behind a steam machine. Since then he has noted that working in tight spaces, bending and others exacerbate his back condition. Overall he recalls about three times a year when his back pain flares up and radiates into the left lower extremity with a burning sensation into the sole of the left foot. Usually he takes medications, keeps working and gets over it within a few days. In 1997 he quit EB and joined Anchor Insulation with same symptoms recurring again at the same frequency. However, around September of 1999 his pain came back and seems to have been constant since then. Again the left lower extremity is where he is hurting with a knot sensation in the left gluteus area. No definitive injury or incident related in September of '99. Bending and sneezing seem to aggravate his condition.

AX 16. Dr. Salame's impression was discogenic lumbar pain with underlying disc problem at L5-S1. *Id.*

Despite his apparent retirement plans, the record shows that Dr. Browning continue to see the Claimant. On April 17, 2000, he reported that the Claimant's back was better and that the Claimant was able to bend to at least 70 degrees. At this time, he also stated that the Claimant has hand/arm vibration syndrome. He recommended to the Claimant's attorney that he be authorized to proceed with treatment, that Dr. Salame designated as the treating physician and that the Claimant should undergo physical therapy and be fitted for a back brace. Dr. Browning added that he hoped that the Claimant would improve to the point of being able to perform light work, but he cautioned that the Claimant should not return to work at Anchor as his job there required fairly heavy lifting and quite frequent bending. AX 19.

As of July 2000, Dr. Browning noted that the Claimant's back condition was unchanged with the Claimant beginning to have some more pain on the right side in addition to the left. AX 21. On July 31, 2000, after the Claimant had apparently been seen by a Dr. Wainwright, Dr. Browning wrote to the Claimant's attorney, stating that his August 22, 1999 letter was in error in that it indicated that the Claimant had not used air tools at EBC when he had used air tools extensively as a painter for about six months.⁷ In this letter, Dr. Browning also stated that he "disagreed completely with Dr. Wainwright that

⁷ Dr. Browning's statement about the Claimant's use of air tools as a painter is partially contradicted by the Claimant's EBC personnel records which show that he was hired on March 22, 1990 as a pipe coverer and worked in that classification until April 1997 when he was converted to a painter position. RX 3. The EBC records also show that the Claimant's employment at EBC ended on

the work at Anchor Insulation specifically aggravated his low back”, and he instead suggested that the Claimant’s back condition was entirely due the prior injury sustained at EBC. AX 23.⁸

At the Claimant’s request, Dr. Browning’s deposition was taken January 8, 2001. CX 7.⁹ Dr. Browning testified that he saw the Claimant on August 11, 1999 and again on September 9, 1999, at which time the Claimant had acute back pain going down the left leg to the toes. *Id.* at 5, 7-8. Dr. Browning stated that the Claimant’s back symptoms on September 9, 1999 were significantly worse than they were when he was seen one month earlier, and he stated that he considered the Claimant to be totally disabled at that point in time. *Id.* at 8-9. Dr. Browning testified that he continued to follow the Claimant and considered him to be totally disabled through April 13, 2000. *Id.* at 9-15. He further testified that he examined the Claimant again on June 8, 2000 and found objective clinical evidence (absent knee and ankle reflexes and positive left-side LaSaque) for dysfunction of the reflex unit and significant nerve impingement, findings which he described as consistent with the August 27, 1999 MRI. *Id.* at 15-17. Dr. Browning stated that he did not believe that the Claimant could have returned to his job at Anchor as of June 8, 2000 because of the bending and lifting requirements of insulation work, and he stated that he would have restricted the Claimant at that time to work involving very limited bending and lifting, no twisting, turning or crawling and no prolonged sitting or standing. *Id.* at 18-19. When Dr. Browning next saw the Claimant on July 27 and September 7, 2000, he found the Claimant’s back condition to be somewhat improved, but still abnormal, and he ordered a standard lower lumbar back brace with the idea of returning the Claimant to some type light duty. *Id.* at 19-21. Dr. Browning testified that it was his opinion that the Claimant should have a repeat MRI and a follow-up evaluation with a neurosurgeon to assess the current status of his lumbar disc before an opinion could be rendered on whether the Claimant had reached maximum medical improvement. *Id.* at 23-24. He stated that the Claimant could do light work with the restrictions he had previously identified, but he stated that he did not think that he could ever recommend that the Claimant return to his previous employment at either EBC or Anchor due to the marginal condition of his back. *Id.* at 24-25.

On cross-examination by Anchor’s counsel, Dr. Browning testified that he had taken the Claimant’s past history, and the Claimant did not mention that he had been involved in a motor vehicle accident in the mid-1980s or that he had sustained a back injury in 1987 while working at Franklin Farms. *Id.* at 26-27. He also testified that when taking the Claimant’s history, he looked closely at the question of whether the Claimant’s employment caused or contributed to his back injuries and concluded that it did not:

May 29, 1997 when he was laid off. *Id.*

⁸ There is no report or other records from Dr. Wainwright in evidence.

⁹ EBC’s objection to the admission of Dr. Browning’s opinion on the identity of the responsible employer in this matter is sustained inasmuch as this opinion, at least in part, addresses a question of law which exceeds the scope of Dr. Browning’s expertise.

A. It was my opinion that Mr. Horton's employment at Anchor Insulation did not contribute in any way to his back injury or his back problems.

Q. Why is that?

A. I could get no history of injuries, I could get no history of repetitive injury, and I could not find any basis for any injury at Anchor Insulation.

Id. at 27-28. Dr. Browning thus concluded that "[a]s far as I'm able to tell, his work at Anchor Insulation did not aggravate or exacerbate his back condition." *Id.* at 28-29. However, Dr. Browning also testified,

Well, I first saw him on August 11th. At that point, he didn't need any medication, but then his back got worse and he saw me on 9/9/99. That's when I put him out, and that's when he needed medication and all the rest of the stuff.

Id. at 29. On cross-examination by EBC's counsel, Dr. Browning stated that he had not reviewed the records from the Backus Hospital relating to the Claimant's motor vehicle accident and reported back injury at Franklin Farms or the medical records from EBC relating to the Claimant's 1991 back injury, and he stated that he had no information in his record as to whether the Claimant had seen any physician between 1991 and 1999 for his back injury. *Id.* at 31-32. Dr. Browning also testified that he did not review the Claimant's job duties at Anchor in detail, and he stated that he did not have any information as to what types of equipment the Claimant was required to lift at Anchor, the Claimant's specific duties at Anchor between the time when he was first seen on August 11, 1999 and when he was seen on September 9, 1999 with increased back pain, or whether the Claimant was doing any heavy lifting or work in tight, confined spaces during this period. *Id.* at 33-34, 39-40. Dr. Browning acknowledged that he did not have any record of examining the Claimant's back until June 8, 2000, explaining that he was initially more concerned with the Claimant's hands. *Id.* at 36-38. He also acknowledged that had very little understanding of the nature of the Claimant's work for Anchor:

I really didn't get into what he did specifically at Anchor Insulation. It was my impression that they did primarily – that they installed insulation in structures, but I did not get into it in any detail.

Id. at 41. Finally, Dr. Browning testified that he did understand that the Claimant's work at Anchor was "heavy" and that he recommended that he not return to work at Anchor because the possibility exists that he could aggravate or worsen his back condition by performing heavy work at Anchor. *Id.* at 40.

The Claimant was also evaluated at the request of EBC's attorneys, on December 4, 2000 by Philo F. Willetts, Jr., M.D. , a board-certified orthopedic surgeon. In his initial report, which is dated December 4, 2000, Dr. Willetts states that the Claimant gave a history of developing low back pain when he got stuck in a confined space while working at EBC. AX 25 at 1. Dr. Willetts also noted that the Claimant reported losing two weeks of work at Anchor in 1997 after he woke up with low back pain and that he had been laid off by Anchor in 1999 after he developed low back pain while working on a roof at Pfizer and reported the pain to his supervisor who advised him to go on temporary disability. *Id.* at 3-4. After reviewing the results of his examination of the Claimant and the Claimant's medical records, Dr. Willetts concluded that the Claimant was partially, but not totally disabled, and he stated that the Claimant should avoid lifting more than 30 pounds, avoid frequent repetitive bending and avoid working in areas with low ceilings or in tight compartments. *Id.* at 6. Dr. Willetts further concluded that the Claimant has a 13% impairment of the lumbar spine. He stated that at least 7% of this impairment could be attributed to the June 27, 1991 injury, but he added that it was unclear whether the remaining 6% impairment of his lumbar spine impairment occurred as a result of separate events in 1997 or 1998. *Id.* at 7.

Dr. Willetts reviewed additional medical records and prepared a supplemental report dated December 29, 2000. After noting that the records from the Backus Hospital conflicted with the Claimant's history that he had never been involved in a motor vehicle accident or injured his back prior to June 27, 1991, Dr. Willetts amended his earlier opinions as follows:

Mr. Horton is partially disabled due to his back. No injury of June 21, 1991, was the sole cause of his disability. He had previous back injury, including a workers* compensation injury at Franklin Mushroom, despite his denial. He also had been involved in a rollover motor vehicle accident, occurring on August 30, 1986, and could well explain the T12 compression noted in x-rays taken many years later. In addition, Mr. Horton was documented to have upper extremity neuropathy.

Based on the enclosed medical records, my response to Question #6, apportionment, also changes. Based upon having had a previous workers*compensation injury to the low back at Franklin Mushroom and which caused him to lose some time from work (despite his denial of ever having had any back pain prior to June, 1991), there was impairment that would have preexisted June 27, 1991, based on clinical signs of injury.

Of the 13% permanent partial physical impairment of the lumbar spine, 7% preexisted June 27, 1991. If his history be correct, a being caught in a tight spot while on a submarine June 27, 1991, would have produced another 3% permanent partial physical impairment of the lumbar spine. The remainder of his lumbar spine impairment would be more appropriately apportioned to whatever events or incident may have occurred prior to awakening with back pain in 1997 or 1998.

AX 26 at 2-3. Dr. Willetts further stated that in view of the conflicts between the Claimant's chronicle of his medical history and the medical records, the Claimant's own history must be treated with some caution. *Id.* at 3.

Dr. Willetts testified at a deposition taken on January 25, 2000. He testified that based on his review of the medical records, the Claimant's history and his examination of the Claimant, he formulated diagnoses of hand neuropathies by history and a small disc herniation at L5-S1 with radiological and clinical signs of left S1 nerve root impingement and radiculopathy. *Id.* at 10. Dr. Willetts further testified that it was his opinion that the Claimant's June 27, 1991 injury at EBC was not the sole cause of his disability. Referring to the more recent records from the Lawrence and Memorial Hospital and Dr. Browning, Dr. Willetts identified the following additional factors as bearing on the Claimant's disability status as of September 9, 1999:

Clearly based on the more recently received notes, there was an increase in his back disorder. Whereas the single time he sought medical treatment in 1991 and for the seven years thereafter mention only a muscle strain [on] June 27, 1991, the April 22, 1998 Lawrence & Memorial Hospital emergency room note now described a radicular type of pain going down the leg and involved with numbness with a suspected disc herniation later confirmed in the MRI of August 27, 1999, and by Dr. Browning's examination of September 1999.

Id. at 14-15. Dr. Willetts testified that it was his opinion that the Claimant has a 13 percent permanent partial impairment of the lumbar spine, and he stated that seven percent of this impairment pre-existed the June 27, 1991 injury as there were clinical signs in the medical records of a prior back injury at Franklin Farms in 1987. *Id.* at 15-16. Dr. Willetts continued,

There would have been an increased impairment in April of 1998 and certainly as of September of 1999 when he had evidence of radiculopathy. And so the episode, whatever it was, in 1998 causing him to go to the emergency room on April 22 probably contributed three percent permanent partial physical impairment of the lumbar spine. And the remainder probably occurred later in 1999.

Id. at 16-17. Dr. Willetts further testified that assuming the Claimant's job at Anchor involved carrying pin welders weighing between 50 and 75 pounds up and down ladders and working in tight, confined spaces such as the engine rooms and pilot houses on ferries, it was his opinion that the Claimant's work at Anchor aggravated his back condition:

In my opinion, his work at Anchor Insulation very probably aggravated his condition over and above the simple muscle strain which had been the previous diagnosis [on] June 27, 1991, to that of symptomatic disc herniation [on] April 22, 1998, and intermittently thereafter.

Id. at 17.¹⁰ Dr. Willetts additionally testified that it was his opinion that the Claimant should not lift more than 30 pounds and that he should avoid frequent or repetitive bending and working in areas with low ceilings. *Id.* at 25. He stated that he did not believe that the Claimant was capable of returning to his full duties at Anchor after September 9, 1999, but he felt that the Claimant could have returned to work with restrictions at some time after September 1999 and before December 2000 when he examined the Claimant. *Id.* at 27-28. Finally, Dr. Willetts was questioned about the statement in his report that the Claimant had given a history of developing back pain while working on a roof at Pfizer just prior to leaving his job with Anchor. Referring to the notes he took while speaking to the Claimant, Dr. Willetts testified that the Claimant told him that the last incident he had with his back occurred while he was working as a foreman on a roof at Pfizer, that he informed his employer and asked to get his expenses taken care of, and that he was advised to go on temporary disability insurance. *Id.* at 29-30. Dr. Willetts described his notes of the Claimant's work history as "very brief" and "poorly legible". *Id.* at 19, 22.

E. Vocational Evidence

Anchor introduced a Vocational Analysis and Employability Evaluation dated January 5, 2001 which was prepared by Cherie L. King, M.Ed., CRC, and a Vocational Assessment Report from Ms. King dated February 16, 2001. AX 29, 30. In her initial analysis and evaluation, Ms. King reviewed the Claimant's work history, noting that his past work as a horticultural worker and insulation worker required medium to heavy exertion, and medical reports from Drs. Willetts and Salame. AX 29 at 1. Based on the medical and functional capacity information available to her, Ms. King concluded that the Claimant has a current residual functional capacity for light work in that he is capable of lifting up to 20 pounds occasionally and sitting standing and walking intermittently for up to eight hours per day. She also noted that he should avoid repetitive bending and working in tight, low-ceilinged compartments. *Id.* at 3. Ms. King additionally stated that she had identified three alternative occupational categories which are consistent with the Claimant's physical abilities, vocational preparation and aptitudes, education, training and temperament – hotel clerk, small products assembler and security guard. *Id.* Finally, Ms. King reported the results of a labor market survey in which she identified five employers in the New London, Connecticut area who were currently hiring for assembler positions in the wage range of \$6.50 to \$10.00 per hour, four employers who were currently hiring for hotel clerk positions in the wage range of \$7.00 to \$8.00 per hour, and three employers who were hiring for security guard positions in the wage range of \$6.15 to \$8.00 per hour. *Id.* at 3-4.

In her February 16, 2001 assessment, Ms. King stated that she had met with the Claimant in addition to reviewing medical records. AX 30. Ms. King reported that the Claimant had commenced full-time employment on February 12, 2001 as a security guard earning \$8.00 per hour and that he had

¹⁰ Anchor's objection to the question posed by counsel to EBC is overruled as the record establishes that the Claimant's working conditions at Anchor were consistent with the facts Dr. Willetts was asked to assume.

enrolled in a bartending school at his own expense. *Id.* at 2. She stated that after interviewing the Claimant, she continued to believe that the assembler, hotel clerk and security guard jobs identified in her labor market survey are appropriate alternative occupations for the Claimant given his physical limitations, aptitudes, education, and transferable skills. *Id.* at 3-4. Ms. King also stated that work as a bartender is consistent with the Claimant's physical abilities, general aptitudes and educational and skill levels, and she pointed out that the employment outlook for bartenders, both nationally and in Connecticut, is good with most bartenders earning a minimum wage of \$6.40 per hour plus tips. *Id.* at 4.

IV. Findings of Fact and Conclusions of Law

- A. Is the claim against Anchor barred by the Claimant's failure to give timely notice pursuant to section 12 of the Act?

Section 12 of the Act provides that, except for cases involving an occupational disease, written notice of an injury or death must be given to the OWCP within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment. 33 U.S.C. §912(a)-(c). However, section 12(d) provides that failure to give the required notice will not bar a claim if the employer or its insurance carrier had actual knowledge of the injury or death, if it is determined that the employer or carrier has not been prejudiced by the failure to give notice, or if the failure to give notice is excused. 33 U.S.C. §912(d).

Anchor concedes that it knew that the Claimant left work in September 1999 with a back problem, but it contends that it did not learn that the Claimant was alleging a work-related back injury at Anchor until February 2000 when it received a LS-203 form from the OWCP. Anchor points out that the Claimant acknowledged at his deposition that he had told three different Anchor representatives that his back injury was not caused by his work at Anchor and that the Claimant indicated on the disability insurance claim form in September 1999 that his injury did not occur at work. Anchor Post-Hearing Memorandum at 6. Anchor further contends that it was misled by the Claimant's repeated assurances that his back condition was not related to his employment at Anchor, and it argues that it has been prejudiced by the Claimant's failure to provide timely notice of his alleged injury because it was unable to effectively investigate the claim due to the fact that the Claimant's supervisor, Carl Lallier, left Anchor's employ in January 2000 and since PRS ceased operations shortly after September 1999. *Id.* at 7-8.

An employer bears the burden of coming forward with substantial evidence that it has been unable to effectively investigate some aspect of the claim due to the claimant's failure to provide adequate notice. *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233, 240 (1990). *See also Strachan Shipping Co. v. Davis*, 571 F.2d 968, 972 (5th Cir. 1978); *Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F.2d 146, 152 (3rd Cir. 1975). Granted, it is likely that the closure of the PRS operation and Lallier's termination would have made it somewhat more

difficult for Anchor to investigate the claim. However, an allegation of difficulty in investigating is not sufficient to establish prejudice. *Williams v. Nicole Enterprises*, 21 BRBS 164, 169 (1988) (allegation of difficulty in investigating claim where crew of vessel had scattered by time employer received notice). Aside from alleging that the delay in receiving notice compromised its ability to investigate the claim, Anchor had offered no evidence that Lallier or PRS employees or officials were unavailable for interview or deposition. Nor has it shown that it could not obtain pertinent medical records or develop medical evidence of its own. Anchor acknowledges receiving notice of the claim by February 2000. The case did not proceed to hearing until 11 months later. Under these circumstances, I find that Anchor and Beacon have not demonstrated that they were prejudiced by the Claimant's failure to provide timely notice of his back injury pursuant to section 12. *Steed v. Container Stevedoring Co.*, 25 BRBS 210, 217 (1991) (affirming ALJ's finding that employer had failed to carry its burden of establishing prejudice where it had over seven months prior to hearing to arrange for an independent medical examination and was able to produce the claimant's medical records). Accordingly, I conclude that the Claimant's failure to give timely notice of his alleged back injury at Anchor is excused by section 12(d)(2).

- B. Did the Claimant suffer an injury arising out of and in the course of his employment at Anchor which is covered by the Act?

EBC has stipulated that the Claimant suffered a work-related injury to his back on June 27, 1991. The Claimant alleges that he sustained a second, aggravating injury or reinjury to his back while working for Anchor in confined spaces on ferries at PRS during August and early September 1999, including a three-day period from September 1 to September 3, 1999 when he worked alone repairing insulation in confined areas of the engine room and pilot house of a ferry. The Claimant testified that his lower back symptoms worsened after bending and crouching to work in the confined areas on the ferries at PRS. The claim of a lower back injury is corroborated by the August 27, 1999 MRI results which showed a herniated disc and forminal narrowing at the L5-S1 level and by Dr. Browning's records which show that the Claimant sought treatment for back pain over the Labor Day 1999 weekend and was taken out of work the following week due to his back condition. Although Anchor's witness, Mr. Fisk, agreed with the Claimant's description of the physical demands of his work, including the Claimant's testimony that he frequently worked in the engine room and pilot house areas of the PRS ferries, Anchor contends that the Claimant's alleged back injury did not occur in the manner or time period asserted by the Claimant. In this regard, Anchor submits that the Claimant's testimony that he worked for three days in the PRS ferries from Wednesday, September 1, 1999 through Friday, September 3, 1999 is contradicted by his time sheets for this period, which reflect that he only worked four hours at PRS on September 1, 1999, and by the testimony of Mr. Fisk that an employee's time sheet is the "Bible" used to generate payroll and to charge customers. Anchor additionally submits that the Claimant's testimony regarding the weight of the boxes that he carried out of the PRS warehouse with Gary Monroe on September 4, 1999 is directly contradicted by Mr. Monroe's testimony that he never lifted anything weighing in excess of 100 pounds with the Claimant. Anchor Post-Hearing Memorandum at 2-5. And, it argues that the Claimant's testimony that he injured his back while working at Anchor is refuted by his past statements to Anchor officials that nothing in the work at Anchor was hurting his back. *Id.* at 10-11.

To be sure, there are some inconsistencies in the details of the Claimant's account of pertinent events, and I specifically find that he likely exaggerated in claiming that some of the boxes that he helped carry out of the PRS warehouse on September 4, 1999 weighed more than 200 pounds. In addition, as Dr. Willetts has appropriately pointed out, the Claimant has shown himself to be something less than a completely reliable historian when relating his medical history. However, I found the Claimant to be a generally sincere and credible witness, and in particular his testimony concerning where he worked and what he did on September 1 through 3, 1999 was unwavering and convincing. Moreover, his statement that he worked at PRS for three days repairing insulation in the engine compartment and pilot house of a ferry is entirely consistent with Anchor's work order for the job. The conflict between the work order, the Claimant's testimony and his time sheets is troubling, but I find the Claimant's explanation that the time sheet does not always accurately reflect where an employee worked to be more probable than Mr. Fisk's claim that the Claimant finished the entire PRS job in just four hours when Anchor itself estimated that the job would require three full days. Simply put, I find it incredible that Anchor, a self-described expert in maritime insulation, would overestimate the man hours required for the PRS insulation repair job by six times. I also find it significant that Mr. Fisk relied on the time sheets, rather than his personal knowledge of the Claimant's whereabouts, and that Mr. Monroe, who was in a position as the Pfizer foreman to personally know where the Claimant worked on the dates in question, did not testify that the Claimant worked at Pfizer on September 1 through 3, 1999, as purported by Anchor's time sheets, or otherwise contradict the Claimant's testimony that he was working on the ferry at PRS on these dates. I similarly discount Dr. Willetts' account that the Claimant experienced back pain while working on a roof at Pfizer in light of the Claimant's testimony that Dr. Willetts did not pay close attention to his history and Dr. Willetts' admission that his notes were brief and partially illegible. As for the Claimant's statements to Anchor officials that his back condition was not caused by his work at Anchor, I note that the Claimant's candid testimony at the hearing reflects that his understanding of an "injury" is confined to discreet, traumatic events, and I find that his reluctance to "blame" Anchor for his back problems in the absence of any traumatic episode is not inconsistent with his testimony that working in tight, confined places on the PRS ferries worsened the back pain that he had periodically experienced since the June 27, 1991 injury at EBC.

Accordingly, I find that the Claimant has credibly shown that suffered a harm while working for Anchor and that employment conditions existed or a work accident occurred at Anchor which could have caused, aggravated, or accelerated the condition. This showing by the Claimant is sufficient to establish the fact of an injury and to invoke the presumption at section 20(a) of the Act that the injury is related to his employment at Anchor on the PRS ferries. *United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor*, 455 U.S. 608, 612-613 (1982); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701-702 (2d Cir. 1982). See also *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170, 175-75 (1989), *aff'd*, 892 F.2d 173 (2d Cir. 1989). The Claimant's uncontradicted testimony that his work for Anchor at PRS consisted of installing and repairing insulation on vessels being constructed on a navigable waterway or land areas adjoining a navigable waterway also invokes the section 20(a) presumption to establish the "status" and "situs" elements necessary to bring his claim within the jurisdiction of the Act. See

Fleischmann v. Director, Office of Workers' Compensation Programs, 137 F.3d 131, 135 (2d Cir. 1998).

Having successfully invoked the section 20(a) presumption that his back condition is related to his covered employment at Anchor, the burden shifts to Anchor to come forward with substantial evidence severing the presumed connection between the Claimant's injury and his employment. *DelVecchio v. Bowers*, 296 U.S. 280, 286-287 (1935); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). Anchor itself introduced no evidence to rebut the presumption, but the record does contain the opinion from Dr. Browning that the Claimant's employment at Anchor did not aggravate or exacerbate his back injury. However, I find that Dr. Browning's opinion on the etiology of the Claimant's injury and whether the Claimant's employment at Anchor played any contributory role, while countervailing, does not constitute substantial evidence sufficient to rebut the section 20(a) presumption in view of Dr. Browning's admission that he had no knowledge of the Claimant's duties at Anchor and particularly what duties the Claimant was performing in August and September 1999. *See American Grain Trimmers v. Office of Workers' Compensation Programs*, 181 F.3d 810, 818-819 (7th Cir. 1999) (physician's opinion that worker's death was not caused by his employment does not constitute substantial evidence to rebut the section 20(a) presumption where the physician stated that he had no idea what work the decedent had been performing prior to his death). I also give little credence to Dr. Browning's reliance on the Claimant's failure to relate any "injury" during his Anchor employment in light of the Claimant's testimony that he understands the term to mean a traumatic event such as a fall. Moreover, even if Dr. Browning's opinion were viewed as sufficient to rebut the presumption, I would nonetheless conclude upon consideration of the record as a whole that the opinion from Dr. Willetts that the Claimant's employment at Anchor very probably aggravated his back injury is entitled to greater weight as it is based on an accurate understanding of the physical demands of the Claimant's work for Anchor on the PRS ferries and a reasoned assessment of the objective medical evidence which shows that the muscle strain diagnosed with in 1991 worsened during the Claimant's employment at Anchor to a herniated disc with radicular symptoms running to the left leg and foot.

Based on the foregoing, I conclude that the Claimant has established that, in addition to the work-related injury to his back in 1991, he suffered an injury to his back arising out of and in the course of his employment at Anchor that falls within the Act's coverage. I also conclude that there was an employer-employee relationship in effect between the Claimant at the time of this injury as it occurred prior to the Claimant's leaving work on September 7, 1999, and I conclude on the basis of the reasoned medical opinion from Dr. Willetts that EBC has met its burden of proving, without the aid of any presumption, that the Claimant's back injury at Anchor was a second injury or aggravation which relieves EBC of liability as the responsible operator. *Buchanan v. International Transportation Services*, 31 BRBS 81, 84-85 (1997). Consequently, liability under the Act is imposed on Anchor as the employer for which the Claimant was working when he sustained the second, aggravating injury or reinjury. *See Foundation Contractors v. Director, OWCP*, (9th Cir. 1991); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, (5th Cir. 1986) (en banc).

- C. Is the Claimant disabled as a result of his injury and, if so, what is the nature and extent of his disability?

The Claimant has the initial burden of proving that he can not return to his usual employment. *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). A claimant's usual employment is defined as the regular duties the claimant was performing at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). To determine whether the Claimant has carried his *prima facie* burden of establishing that he is unable to return to his usual employment, I must compare the medical opinions regarding his physical limitations with the requirements of his usual work as an electrician at the Employer. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988).

Drs. Willetts and Browning both have provided medical opinions that the Claimant is limited to lifting no more than 30 pounds and that he can not do jobs requiring frequent or repetitive bending or work in confined or low-ceilinged areas. The uncontradicted evidence establishes that the Claimant's job at Anchor regularly required lifting tools weighing well in excess of 50 pounds, frequent bending and work in confined and low-ceilinged areas. Thus, the record convincingly shows that the Claimant is unable to return to his usual employment, and Anchor does not contend otherwise.

In view of my finding that the Claimant has established that he is unable to return to his former employment because of a work-related injury, the burden shifts to Anchor to demonstrate the availability of suitable alternative employment or realistic job opportunities which the Claimant is capable of performing and which he could secure if he diligently tried. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991) (*Palombo*); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981) (*Gulfwide Stevedores*); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989). To satisfy its evidentiary burden, "the employer does not have to find an actual job offer for the claimant, but must merely establish the existence of jobs open in the claimant's community that he could compete for and realistically and likely secure." *Palombo*, at 74, citing *Gulfwide Stevedores* at 1042-43. If Anchor does not carry this burden, the Claimant is entitled to a finding of total disability. *American Stevedores v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976). Once an employer satisfies its burden, a claimant may rebut the showing of suitable alternative employment by establishing "that he was reasonably diligent in attempting to secure a job 'within the compass of employment opportunities shown by the employer to be reasonably attainable and available.'" *Palombo*, at 74, quoting *Gulfwide Stevedores*, at 1043.

Here, the Claimant conceded at the hearing that he is capable of performing light and sedentary work. TR 14. Additionally, Anchor has introduced Ms. King's vocational analysis and labor market survey which shows that several positions exist in the Claimant's community which can be performed by an individual with the Claimant's physical limitations and which pay wages from \$6.50 to \$10.00 per hour. AX 29, 30. Indeed, the record shows that the Claimant successfully applied for and obtained work as a security guard earning \$8.00 per hour as of February 12, 2001. AX 30 at 3. Based on this evidence, I find that Anchor has carried its burden of establishing the existence of suitable alternative employment as of January 5, 2001, the date of the labor market survey. *Palombo* at 77 (a showing of suitable alternative employment "may not be applied retroactively so as to commence partial disability status before suitable alternative employment is shown to exist."). Anchor and Beacon state that they

are willing to accept the Claimant's \$8.00 hourly wage as the correct measure of his current wage earning capacity. They also note that the Claimant testified that he plans to go to bartending school and work part time as a bartender, and they request that any compensation awarded to the Claimant be further offset by \$73.90 per week (\$7.39 per hour x 10 hours per week) based on Ms. King's report that the states that bartenders earn an average wage of \$7.39 per hour. I agree that \$8.00 per hour fairly represents the Claimant's current wage earning capacity, but I will not order any additional offset as the record does not reflect that the Claimant has successfully completed bartending school and that there are bartending openings in the Claimant's community that he could compete for and realistically and likely secure. Should the Claimant's earning capacity increase in the future, the change in economic conditions can properly be addressed in a modification proceeding under section 22 of the Act. *Fleetwood v. Newport News Shipbuilding and Drydock Co.*, 16 BRBS 282, 283-284 (1984), *aff'd*, 776 F.2d 1225 (4th Cir. 1985).

A final matter to be addressed concerning the nature and extent of the Claimant's disability is whether his disability has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement. The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988); *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); *Eckley v. Fibrex and Shipping Company*, 21 BRBS 120 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). Although he stated in his first report that the Claimant reached a point of maximum medical improvement in September 1991, three months after the June 27, 1991 injury at EBC, AX 25 at 6-7, Dr. Willetts did not address the question of permanency following the Claimant's second injury while working for Anchor. On the other hand, Dr. Browning testified that it was his opinion that the Claimant should have a repeat MRI and a follow-up evaluation with a neurosurgeon to assess the current status of his back before an opinion could be rendered on whether he has reached a point of maximum medical improvement. CX 7 at 23-24. It appears that the Claimant has been unable to obtain further testing and evaluation because of the dispute between EBC and Anchor as to which of them is liable for the Claimant's medical care. On this record, I conclude that the evidence does not support a finding that the Claimant's disability has reached a point of maximum medical improvement and, therefore, become permanent. *See James v. Pate Stevedoring Co.*, 22 BRBS 271, 274-275 (1989). Accordingly, I conclude that his disability remains temporary in nature.

Based on the foregoing findings, I conclude that the Claimant has established that he was temporarily totally disabled from September 8, 1999, when he left Anchor's employment due to his back injury, and January 4, 2001. I further conclude on the basis of Anchor's successful showing of suitable alternative employment beginning January 5, 2001 that the Claimant has not been totally disabled since that date and that his permanent disability from that date forward has been partial with a residual earning capacity of \$8.00 per hour.

D. Amount of Compensation Due

The Claimant is entitled to compensation for his period of temporary total disability pursuant to section 8(b) of the Act which provides that the compensation rate is $66 \frac{2}{3}$ per centum of the average weekly wages. 33 U.S.C. §908(b). The parties have stipulated to an average weekly wage \$540.00 with a corresponding compensation rate of \$360.18. Based on the parties' stipulation, I find that the Claimant is entitled to temporary total disability compensation at a rate of \$360.18 from September 8, 1999 through January 4, 2001.

The Claimant's entitlement to compensation beginning on January 5, 2001 is controlled by section 8(e) of the Act which provides "In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years." 33 U.S.C. §908(e). I have found that the Claimant has a post-injury wage-earning capacity of \$8.00 per hour or \$320.00 per week. Based on this calculation, I find that the Claimant has suffered a loss of wage-earning capacity since January 5, 2001 in the amount of \$220.00 per week (the difference between his average weekly wage and his wage-earning capacity) and, pursuant to section 8(e), he is entitled to temporary partial disability compensation at the rate of $66 \frac{2}{3}\%$ of that difference or \$146.67 per week for a period not exceeding five years.

Anchor and Beacon seek to offset their compensation liability by the amount of wages actually earned by the Claimant in alternative employment during 2000 and by the amount of short-term disability benefits received by the Claimant. Anchor Post-Hearing Memorandum at 16-17. The parties have stipulated that the Claimant earned \$2,000.00 during this period, and I will order the requested offset in this amount. However, Anchor and Beacon are not entitled to a credit for payments made by a non-occupational sickness and accident carrier. *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15, 21 (1986), *rev'd on other grounds*, 948 F.2d 941 (5th Cir. 1991); *Jacomino v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 680, 684 (1979); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473, 480-481 (1978).¹¹

¹¹ Anchor's contention that this Court has previously acknowledged the parties' agreement in the State of Connecticut that a claimant repay the amount of disability benefits received is noted. Anchor Post-Hearing Memorandum at 16-17, citing *Crowley v. Gibbs & Cox, Inc.*, Case No. 2000-LHC-01943 (Hearing Transcript, November 27, 2000). That case, however, is distinguishable because the parties submitted an agreement that the claimant would be liable to repay the disability benefits he had received. ALJ Decision and Order (May 15, 2001), slip op. at 30. Here, no such agreement has been entered into the record. If indeed there is such an agreement, the parties can privately make arrangements for repayment.

E. Entitlement to Medical Benefits

An employer found liable for the payment of compensation is additionally responsible pursuant to section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). In view of Dr. Browning's uncontradicted recommendation that the Claimant undergo a follow-up MRI and neurological evaluation with Dr. Salame, I will order that Anchor pay for these evaluations and any future medical treatment which may be reasonable and necessary for the Claimant's work-related back injury.

F. Interest

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F.2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). The Board has also concluded that inflationary trends in the economy have rendered a fixed interest percentage rate no longer appropriate to further the purpose of making claimant whole, and it has held that "the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982)" which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. My order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

G. Attorney's Fees

Having successfully established his right to compensation and medical benefits, the Claimant is entitled to an award of attorney's fees under section 28(a) of the Act. *American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976); *Ingalls Shipbuilding v Director, OWCP*, 920 F.2d 163, 166 (5th Cir. 1993). Accordingly, I will allow a period of 30 days for the Claimant's attorney to submit the required application for fees for services performed on behalf of the Claimant with respect to his claim for benefits under the Act. 33 U.S.C. §928(c); 20 C.F.R. §702.132.

V. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Anchor Insulation Company, Inc and Beacon Mutual Insurance shall pay to the Claimant Jeffrey Horton temporary total disability compensation benefits pursuant to 33 U.S.C. §908(b) from September 8, 1999 to January 4, 2001 based upon an average weekly wage of \$540.00 resulting in a weekly compensation rate of \$360.18.
2. Anchor Insulation Company, Inc and Beacon Mutual Insurance shall pay to the Claimant Jeffrey Horton temporary partial disability compensation benefits pursuant to 33 U.S.C. §908(e) at the weekly compensation rate of \$146.67 commencing January 5, 2001 for a period not exceeding five years.
3. Anchor Insulation Company, Inc and Beacon Mutual Insurance shall pay to the Claimant Jeffrey Horton interest on all past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.
4. Anchor Insulation Company, Inc and Beacon Mutual Insurance shall be allowed an offset in the stipulated amount of \$2,000.00 for earnings received from alternative employment during the period of temporary total disability.
5. Anchor Insulation Company, Inc and Beacon Mutual Insurance shall furnish the Claimant Jeffrey Horton with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related back injury may require pursuant to the provisions of section 7 of the Act, and they shall authorize the Claimant to undergo the follow-up MRI and neurological examination with Dr. Salame as recommended by Dr. Browning.
6. The Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to opposing counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on May 10, 2000.

7. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

A
DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:dmd